(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 2 8 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Nebraska Service Center (Director). The approval was subsequently revoked by the Director. The Director's decision is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a wholesale/retail children's clothing business. It seeks to permanently employ the beneficiary in the United States as a computer systems analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker (I-140 petition), on January 22, 2009. The petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed with the Department of Labor (DOL) on May 27, 2008 (the priority date),[1] and certified by the DOL on October 8, 2008.

Following a Request for Evidence, to which the petitioner responded with additional documentation, the Director approved the petition on July 30, 2009.

On July 2, 2010, however, the Director issued a Notice of Intent to Revoke (NOIR) the approval of the petition. The Director referred to public information indicating that the petitioner's business had been suspended, and that the petitioner did not seem to be located at the address it claimed for itself. Based on this evidence the Director stated that it did not appear a bona fide job offer existed for the beneficiary.[2]

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[1] The priority date is the date the labor certification application was received for processing by the DOL. See 8 C.F.R. § 204.5(d). If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.

[2] Section 205 of the Act, 8 U.S.C. § 1155, states that:

> The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition.

The petitioner responded to the NOIR on August 2, 2010, with a brief from counsel and additional documentation. Counsel claimed that the petitioner's business was still open, citing a letter from the petitioner's president, and supporting business records, and added that the beneficiary intended to port to a different employer under the provisions of the American Competitiveness in the 21st Century Act (AC-21). In his letter, dated July 22, 2010, acknowledged that his business status had been suspended by the California Secretary of State for a late filing penalty. He asserted that the amount of the penalty was in dispute, but that the matter would be resolved and his business status returned to active. also stated that he had been informed by the beneficiary that she intended to port to a different employer under AC-21. As evidence thereof a letter was submitted from the president of in Vernon, California, dated July 27, 2010, confirming that his company was the beneficiary's "new employer" pursuant to AC-21.

On May 5, 2011, the Director issued a decision revoking the approved petition on two grounds: (1) there did not appear to be a bona fide job offer to the beneficiary since the record indicated that the petitioner's business status was suspended, and (2) the evidence of record did not establish the petitioner's ability to pay the proffered wage. The Director noted the petitioner's pledge in the letter of July 22, 2010, to return its business status to active, but observed that it had not yet done so. Public records showed that the petitioner was listed as "suspended" as far back as March 2010, the Director stated, and more than a year later that status remained the same. The Director also referred to some bank statements from March and April 2010 – before the beneficiary ported to – which indicated that the petitioner had meager financial resources at that time, undermining its claim that it had the ability to pay the proffered wage of $63,274.00.

The petitioner filed a timely appeal, Form I-290B, accompanied by another brief from counsel and supporting documentation. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Counsel asserts that an approved I-140 petition may only be revoked in two situations: if the petitioner requests withdrawal or if the petition should have been denied at the time it was approved, citing the federal court of appeals opinion in *Herrera v. USCIS*, 571 F. 3d 881 (9th Cir. 2009). Neither of these circumstances applies to the instant petition, counsel contends, because the petitioner has not requested withdrawal and the petition was properly approved in July 2009. According to counsel, a correct decision on an I-140 petition can never be revoked. While the suspension of the petitioner's business status after the I-140 petition was approved could result in a denial of the beneficiary's Form I-485 application for adjustment of status if she did not port to another employer under AC-21, counsel claims that the I-140 petition itself is immune from revocation regardless of whether the beneficiary ported. In a similar vein, counsel argues that the petitioner is not required to maintain its ability to pay the proffered wage until the beneficiary ports to another employer under AC-21.

The AAO does not agree with counsel's interpretation of *Herrera v. USCIS*. The appeals court opinion makes clear that the enactment of the portability provision in AC-21 did not alter the authority of the Secretary of Homeland Security to revoke the previous approval of an I-140 visa petition. As explained by the court:

> Had Congress intended to constrain the agency's revocation authority, it easily could have expressed that intent clearly. For example, it could have stated so explicitly in the Portability Provision, or it could have amended 8 U.S.C. § 1155, which provides that the agency may revoke its previous approval of a petition "at any time for . . . good and sufficient cause."

Herrera v. USCIS, 571 F. 3d at 888. Congress did not take either of those legislative steps. The court specifically held, therefore, "that the Portability Provision does not affect the agency's revocation authority" under 8 U.S.C. § 1155. *Id.* at 889. Thus, *Herrera* cannot be interpreted as limiting the revocation authority of the Secretary of Homeland Security in I-140 petitions to the narrow circumstances of fraud at the inception or voluntary withdrawal by the petitioner.

Counsel cites a policy memorandum of U.S. Citizenship and Immigration Services (USCIS) – the so-called Aytes Memorandum of 2005 – and the USCIS Adjudicator's Field Manual in support of its claim that the approved I-140 petition is not subject to revocation. The AAO does agree with counsel's interpretation of these agency documents as precluding the Director's revocation action. In any event, the AAO is not bound by USCIS-internal documents. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the federal circuit court of appeals from the circuit in which the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd,* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA (Administrative Procedures Act), even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

As stated by the Director in his NOIR: "The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of [a] labor certification application establishes a priority date for any immigrant petition later based on the I-140, the petitioner must establish that [the] job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)." Thus, a realistic job offer is a continuous requirement, even for an approved I-140 petition. If the job offer ceases to be realistic before the beneficiary ports to another job, or before his I-485 application for lawful permanent residence is approved, the I-140 petition is subject to revocation.

In the instant case, public records indicate that the petitioner has been in a continuous state of suspension since 2008. According to California state records, the Secretary of State suspended the petitioner on October 30, 2008, and the Franchise Tax Board suspended the petitioner on February 2, 2009. These events coincided with the filing and approval of the labor certification application and the instant petition in 2008 and 2009, respectively. The Director noted in his revocation decision in May 2011 that the petitioner had not followed through on the pledge made by its president in the letter of July 22, 2010 to restore its business status to active, and that the California Secretary of

State's Office still listed the petitioner as suspended. The AAO consulted the Secretary of State's Office again in January 2013, and the petitioner's status is still listed as suspended.

Under California law a corporation may have its status suspended if it fails to file one or more tax returns or pay the balance due on a business tax to the Franchise Tax Board (FTB), or fails to file the annual Statement of Information with the Secretary of State (SOS) or the penalty due on a late filing. *See California Revenue & Tax Code*, section 23301, and *California Corporations Code*, section 2205. The consequences of suspension, which can be imposed by either the FTB or the SOS, are that the suspended corporation may not legally conduct business, may not initiate or defend an action in court, may not protest tax assessments or file a refund claim, may not enforce contracts, and could lose the right to its corporate name. *See Timberline, Inc. v. Jaisinghani*, 54 Cal. App. 4th 1361 (1997).

Under California law, therefore, the petitioner lost its legal right to conduct business in October 2008. Moreover, from the time of its suspension the petitioner could not enter into a binding employment contract with the beneficiary for the job of computer systems analyst. Thus, the job offer in this case ceased to be realistic shortly after the priority date of May 27, 2008 (when the labor certification application was filed), and before the instant petition was filed in January 2009 – *i.e.* long before the beneficiary ported to in late July 2010. Accordingly, the job offer did not remain realistic for the entire time period that the petitioner was the prospective employer. The petitioner did not realistically intend or desire to employ the beneficiary in a legally permissible manner when the petition was filed, in accord with 8 C.F.R. § 204.5(c). On the ETA Form 9089 the petitioner's president declared in Part N (item 7) that the job opportunity would not be contrary to state or local law. As the petitioner's president signed the ETA Form 9089 on November 21, 2008 – after the petitioner's suspension by the SOS – this declaration was apparently false.

In accord with the Director's decision, therefore, the AAO concludes that the petitioner has failed to establish that the proffered position of computer systems analyst was a bona fide job offer uninterruptedly from the priority date until the date the beneficiary ported to another employer. On this ground alone, the petition cannot be approved.

As for the Director's second ground for denial, the documentation of record is deficient with regard to the petitioner's ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) provides as follows:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases,

> additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner has not submitted any of the primary evidence identified in the regulation – either annual reports, federal tax returns, or audited financial statements – for any year from the priority date onward. With respect to the Director's finding that bank statements from March and April 2010 appeared to show that the petitioner was unable to pay the proffered wage at that time, counsel has not supplemented the record with any additional documentation on appeal. Instead, he implicitly acknowledges that the petitioner was unable to pay the proffered wage in March and April 2010 and asserts that an interruption in the ability to pay does not constitute a valid basis for revocation because the beneficiary ported to another employer under AC-21. "Once the beneficiary ported," counsel claims, "any problem with ability to pay was cured." Appeal Brief, page 8. The AAO does not agree.

Like the maintenance of a bona fide job offer uninterruptedly from the priority date onward, the petitioner must maintain a continuous ability to pay the proffered wage from the priority date onward – in this case up to the date the beneficiary ported to another employer. Counsel implicitly acknowledges, however, that the petitioner did not have the ability to pay the proffered wage in March and April 2010, and perhaps a few months longer. Since the time frame of the petitioner's inability to pay preceded the date the beneficiary ported to another employer in late July 2010, the petitioner has failed to establish its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2). In visa petition proceedings the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). On this ground as well, the petition cannot be approved.

For the reasons discussed above, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly the revocation of the prior approval will be affirmed, and the appeal dismissed.

As always in visa petition proceedings, the burden of proof rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.